

H.E.R.O.

HERITAGE AND ENVIRONMENT RESOURCES OFFICE

December 7, 2020

Jeaneanne M. Gettle
Director Water Division
Environmental Protection Agency
Region 4
gettle.jeaneanne@epa.gov

VIA EMAIL ONLY

Re: The Seminole Tribe of Florida's Comments on the Programmatic Agreement with the Advisory Council on Historic Preservation for the State of Florida's 404 Program Application

Dear Ms. Gettle,

The Seminole Tribe of Florida (Seminole Tribe) is a federally recognized tribe pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended. As a sovereign nation, the Seminole Tribe enjoys a special Government-to-Government relationship with federal agencies such as the United States Environmental Protection Agency (EPA). The Seminole Tribe has a significant interest in issues related to the State of Florida's (State/FDEP) application to seek assumption from the EPA of the Clean Water Act Section 404 Permitting Program (404 Program). If EPA moves forward with approval of the State's 404 Program on December 17, 2020, it will likely set a precedent for other states around the Country to follow. The Seminole Tribe participated in the State's rule development process, the Memoranda of Agreement between FDEP and EPA and the Army Corps of Engineers (Corps), and the Operating Agreement (OA) between FDEP and the State Historic Preservation Office (SHPO). The Seminole Tribe considered it imperative to provide feedback to the State to help protect tribal rights and waters as the application package was being developed.

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On September 2, 2020, the Seminole Tribe received an invitation to participate in a Section 106 consultation pursuant to the National Historic Preservation Act. The Seminole Tribe concurs with EPA's determination that approval or disapproval of the State's 404 Program assumption application is a Federal Undertaking triggering a Programmatic Section 106 consultation. On September 28, 2020, the Seminole Tribe participated in formal consultation with EPA on the State's 404 application pursuant to *Executive Order 13175, EPA Policy on Consultation and Coordination with Indian Tribes*, and Section 106 of the National Historic Preservation Act. As requested by EPA, on October 8, 2020 the Seminole Tribe provided comments on areas of the OA with SHPO that should be strengthened in a Programmatic Agreement (PA) with the Advisory Council on Historic Preservation (ACHP) and requested a copy of the draft PA. These comments were acknowledged but have not been responded to. We now understand that EPA did not provide ACHP with the Seminole Tribe's comments. Nor has EPA provided any of the other information to the Tribe that was requested during formal consultation on the assumption package.

The Seminole Tribe did not receive the draft PA with ACHP until November 25, 2020, the day before the Thanksgiving holiday. The Seminole Tribe was given one week to review the PA before EPA continued consultation with the Seminole Tribe and other Tribes on December 2, 2020. Upon quick review of the PA prior to the consultation, most of the Seminole Tribe's feedback was not incorporated nor did EPA acknowledge the comments already made during the consultation. EPA has requested comments from the Tribes on the PA by noon on December 7th. The Seminole Tribe would like to echo the consultation concerns raised in the December 2 consultation meeting regarding the fast track timing of the PA. It is likely that if the 404 Program is approved, that other states will look to the process utilized by FDEP and EPA to pursue 404 assumption. Yet, despite the national importance of the PA and this consultation process, it appears the PA and protection of cultural resources within the 404 Program is not being given due consideration and an appropriate amount of time for consultation and comment. Review of a draft PA is customarily allotted a minimum of thirty days for Tribal review. It is inappropriate to ask Tribal sovereign nations to agree to a PA that will govern cultural resource review in less than a week's time. Further, the Seminole Tribe has asked to be a signatory or concurring party to the PA and the timeframe set forth by EPA for finalization of the PA does not give adequate time for the Seminole Tribal Council to consider and approve such an important PA. The Seminole Tribe does not believe that the process for the PA and tribal consultation under Section 106 has met EPA's trust responsibilities to Tribes.

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The Seminole Tribe reiterates for EPA and ACHP's consideration the following comments on the PA:

- Section III.C of the OA between the Florida Department of Environmental Protection (FDEP) and the State Historic Preservation Office governs Federal Review. Within that section, there are three instances where the FDEP sends an application to EPA for review: 1) during public notice for projects within critical areas established under state or federal law, including sites identified or proposed under the NHPA; 2) where the consulting parties of the OA cannot agree on the effect determination of a proposed activity or where FDEP does not accept the recommendations of one of the consulting parties for the resolution of adverse effects; and 3) if the FDEP does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes. However, the OA does not currently provide a process for EPA to involve ACHP in review of any disputes between the consulting parties on the area of potential effect and any disputes as to whether a site is eligible or potentially eligible for listing in the National Register of Historic Places (NRHP). Within the OA, the Federal Review provisions fall under the section header "Effects Determinations and Resolution of Adverse Effects." The Seminole Tribe believes that the area of potential effect determination and whether a site is eligible or potentially eligible for listing in the NRHP are additional areas where disputes requiring EPA or ACHP resolution could arise but are not covered by the OA Federal Review section. The Seminole Tribe requests that these additional areas of review be added into the PA at Section IV.
- In instances where ACHP's involvement is requested, consulting or commenting Tribes should be provided an opportunity to discuss the dispute with ACHP and EPA. Currently, ACHP has an informal process in place where ACHP and the Seminole Tribe can have a conversation to discuss the Tribe's concerns. As it stands in the draft PA, there is no mechanism that sets forth this opportunity for discussion in the event of a dispute.
- The OA acknowledges at Section I. A.2.b.i that Indian tribes possess special expertise in assessing the eligibility of cultural resources or historic properties that may possess religious and cultural significance. The Seminole Tribe requests that a similar statement be included in the PA.

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- The Seminole Tribe remains interested in the possibility of participating in the PA as an invited signatory due to the potential for FDEP's 404 Program to impact religious and culturally significant historic properties and the Seminole Tribe's foreseeable role as a consulting party under the OA.

The Seminole Tribe provides these additional comments:

- The Seminole Tribe suggests that FDEP also be included as a signatory to the PA. The 404 Program implementation is FDEP's responsibility, not SHPO's. SHPO should not be the only signatory to the PA from the State.

- The Seminole Tribe agrees with the other Tribes in the consultation that additional Tribes, such as the Seminole Nation of Oklahoma, should have been contacted for consultation.

- The Seminole Tribe disagrees with the EPA's mechanism for determining which Tribes should be contacted for consultation. Mere reference to a HUD website is insufficient.

- The Seminole Tribe concurs with the other Tribes that Section VI. Reporting and Monitoring should be updated to reflect whether it is FDEP or SHPO that is responsible for submission of the annual report. Further, all Tribes with an interest in Florida should be provided the report and an opportunity to request a meeting to discuss the annual report.

- As the delegation to FDEP of the 404 Program is perpetual, the Seminole Tribe recommends that a provision be added to the PA that allows for evaluation of the OA and PA every 5 years. This evaluation should include an invitation to interested Tribes.

The Seminole Tribe appreciates the opportunity to continue engagement on this important issue. Please feel free to contact me with any questions or for additional conversation on the finalization of the PA.

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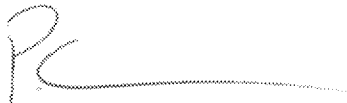
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Sincerely,



Paul N. Backhouse, Ph.D., RPA
Senior Director and Tribal Historic Preservation Officer
Heritage and Environment Resources Office

Copies:

Mary Walker, Regional Administrator - EPA Region 4

Tom McGill, Chief Oceans Wetlands and Streams Protection Branch - EPA Region 4

Matt Hicks, Esquire, Lead Attorney Florida 404 Assumption - EPA Region 4

Michael Creswell, Esquire – EPA Region 4

Eve Zimmerman, Tribal Consultation Advisor - EPA Region 4

Katie Pugh, Regional Indian Program Coordinator - EPA Region 4

Valerie Hauser, Director of Office of Native American Affairs - ACHP

Jaimie Loichinger, Assistant Director of Federal Permitting Licensing and Assistance Section - ACHP

Stephanie Gray, Esquire - FDEP

Marcellus W. Osceola, Jr. - Chairman, Seminole Tribe of Florida

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